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No. 85-56

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN R. CONNOR, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR,
BUREAU OF LABOR STATISTICS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that the decision of the Merit Systems Protection Board (Board) sustaining his removal from employment with respondent was procedurally defective.

1. Petitioner, a former employee of the Bureau of Labor Statistics (Bureau), was removed from his position with the Bureau effective March 5, 1982. The removal was based on charges sustained by the Bureau that petitioner intentionally disobeyed supervisory directions, improperly used a government vehicle for personal use, and took sick leave without proper authority (Pet. App. 1a).

Petitioner appealed his removal to the Merit Systems Protection Board. After a hearing, the Board's presiding official found that the evidence supported the charges (Pet.

App. 3a-23a).[1] The presiding official also rejected petitioner's claims that the Bureau's action against him was retaliatory and a result of unlawful bias; that the Bureau erroneously considered two prior disciplinary actions against him; that the Bureau erroneously interpreted and applied its leave procedures; and that the Bureau's choice of disciplinary action was improper and excessive (*id.* at 23a-51a). The MSPB denied petitioner's request to review the presiding official's decision (*id.* at 55a-57a).

The court of appeals affirmed in an unpublished opinion (765 F.2d 160 (Table)) "on the basis of the presiding official's comprehensive decision (as supplemented by the decision of the full Board)" (Pet. App. 59a). The court could not "conclude that those decisions are unsupported by substantial evidence on the record as a whole, or are arbitrary, capricious, an abuse of discretion, or are contrary to law, or obtained without procedures required by law, rule or regulation" (*ibid.*). See 5 U.S.C. 7703(c).

2. Petitioner asserts that the Board's proceedings were procedurally defective in three respects and that the case should be remanded. The court of appeals correctly rejected petitioner's fact-bound contentions, and its unpublished decision does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

a. Petitioner first contends (Pet. 20-32) that the absence of his second-level supervisor, Paul A. Little, from the hearing prevented a full disclosure of the facts and deprived him of due process.[2] Petitioner suggests that Little *might*

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[1]All three charges were sustained, though the presiding official did decline to sustain one allegation of a particular instance of insubordination and absence without leave (Pet. App. 9a-15a).

[2]The Board hearing commenced on June 21, 1982. Little was out of the country on vacation from June 20 to July 5, 1982.

possess knowledge that *might* tend to confirm petitioner's claims of retaliation and bias (Pet. 25, 29-31).[3] Petitioner's assertions are pure conjecture; the presiding official, on the other hand, found explicitly that "no evidence" supported petitioner's claim of retaliation (Pet. App. 28a) and that petitioner failed to show bias on the part of any Bureau official (*id.* at 39a). Although Little was absent from the hearing, numerous Bureau officials attended and testified, including petitioner's first-level supervisor, Frank Hayden, petitioner's third-level supervisor, Irwin Fiegenbaum, and the Bureau's Regional Commissioner, Alvin Margolis. The presiding official found that the testimony of these Bureau officials was sufficient, as well as competent and credible (see, *e.g.*, *id.* at 27a, 46a-47a); at some point, the presiding official must be able to decide that additional evidence on an issue would be cumulative, irrelevant, or dilatory (Hearing Tr. 405-411). Finally, petitioner knew well in advance of the hearing that Little would not be available (Pet. 15-16) and could have deposed him before he left, 5 C.F.R. 1201.71-1201.75 (1982), but did not attempt to do so.[4]

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[3]Petitioner also seems to claim that Little's testimony could have had some bearing on whether petitioner took sick leave without proper authority (Pet. 14-17, 25, 29-30), but the Board's findings (Pet. App. 17a-18a, 23a, 33a-37a) refute this speculation. In any event, since the only issue in this regard raised by petitioner is the meaning of an FPM letter (see pages 4-5, *infra*), Little's testimony would have been irrelevant.

[4]The petition (at 16) quotes a letter from petitioner's counsel to the presiding official on June 10, 1982, to the effect that the government said at some point that a "deposition at some later date" might be feasible. The petition does not elaborate on this alleged representation, however, and the letter argued against a deposition. Moreover, the government made clear on June 14 that it was willing to make the witness available for a deposition (Little did not leave until June 20). Appellant's Br. (at 92A). It is, of course, up to each side to handle the presentation of its evidence, and it is not the government's fault if, at a later date, the presiding official decided that the proceedings should not be further postponed for a witness with nothing to add.

Petitioner presents no credible evidence that the court of appeals or the Board erred, and his request to reopen the factual record at this late stage should be rejected. There is no reason to suppose that petitioner's fishing expedition with Little would produce any new, material evidence, particularly in light of the accumulated evidence already in the record belying his charge of bias or retaliation.[5]

b. Petitioner next contends (Pet. 32-36) that, because sick leave originally was entered on his time and attendance card for December 15, 1981, the Bureau violated FPM [Federal Personnel Manual] Letter 630-29 (Jan. 28, 1981) when it later changed petitioner's status to absence without leave. As the presiding official observed, however, FPM Letter 630-29 is relevant only "[w]hen leave has been requested, approved, and used" (Pet. App. 34a, 35a). Petitioner never requested, and his supervisors did not give their required prior approval to, four hours of sick leave on December 15, 1981. Rather, petitioner engaged in the "arrogant presumptuous tactic [of] telling his supervisor [that] * * * he [already] was on sick leave * * *" (*id.* at 36a-37a).[6] This, stated the presiding official, "was a violation of the spirit and intent, if not the letter, of the sick leave

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[5]None of the cases cited at Pet. 20-32 applies to a situation like that here, where the evidence in the record is already sufficient to support the agency's action and there is little likelihood that hearing an additional witness would do anything but delay resolution of the case.

[6]Petitioner apparently contends (Pet. 32-33) that his absence should be presumed approved anyway since, he argues, FPM Letter 630-29 appears to require such a presumption once the leave has been so recorded. But whether or not the Bureau made such a post hoc — and apparently accidental — "approval" does not change the fact that, as the presiding official found, petitioner violated the Bureau's established practice of having sick leave approved and requested beforehand. The FPM Letter is relevant to how leave should be recorded, not to whether its taking evidences a disciplinary breach, which is the issue here. In any event, the Letter would not supersede agency practice; its preamble makes clear that it is intended only to provide guidance to the agencies.

OPM [Office of Personnel Management] authority [that petitioner] cites * * *" (*id.* at 37a).[7] The full Board and the court of appeals agreed (*id.* at 57a, 60a).[8]

c. Petitioner's final contention (Pet. 37-41) is that the Board erred in failing to interpret a bargaining unit agreement to resolve whether the Bureau properly considered two instances of prior disciplinary action. The Board correctly rejected this argument (Pet. App. 28a-33a). As the presiding official observed, the general rule is that past disciplinary actions may be taken into account in establishing an appropriate penalty if the following criteria are satisfied: (1) the employee was informed of the action in writing; (2) the action was a matter of record; and (3) the employee was given an opportunity to dispute the action by having it reviewed by an authority other than the one that took the action (*id.* at 29a). These criteria were met here (see

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[7]Common sense compels the conclusion that petitioner's interpretation of sick leave policy must be rejected. An employee simply cannot escape the consequence of his misconduct by relying on FPM Letter 630-29. As the Bureau's Assistant Regional Commissioner explained at the Board hearing, numerous Bureau employees are often in travel status. The time and attendance cards for these employees are routinely filled in based on the employees' representations. If it later is learned that the cards are incorrect, they are amended. Here, the Bureau accepted petitioner's representation that he was on sick leave — which required prior approval — until it had an opportunity to review the validity of the entry. The Bureau's review revealed that the sick leave for December 15, 1981, should be amended to reflect absence without leave. Cf. FPM Letter 630-29 ("An exception to [the rule that petitioner seeks to invoke] is the situation where it is subsequently established that the employee submitted fraudulent documentation or misrepresented either the time taken or the reason for the absence"; here, petitioner implied that his sick leave had been approved in advance when it had not).

[8]Moreover, even if petitioner were correct on his second contention, it would not follow that a different sanction would have been imposed. Petitioner would still have been insubordinate and would still have misused the car, and either would justify his removal.

id. at 32a). Petitioner had the opportunity to dispute the earlier disciplinary actions, but admitted that he did not avail himself of it. As the presiding official remarked, "[W]here [petitioner] is advised of his appeal route and he elects to challenge the agency by ignoring their advice and proceeding independently, based on his individual interpretation of the laws, rules, regulations, and contract, he cannot succeed in alleging harmful error if the result is not to his liking" (*id.* at 32a). In any event, it was inappropriate for petitioner to wait until the Board proceeding to pursue his theory of the bargaining agreement with regard to the earlier disciplinary actions. Thus, it is immaterial whether petitioner's "interpretation" of the bargaining agreement was correct.

In sum, four separate reviewing authorities have found that petitioner's dismissal was justified. His fact-bound arguments deserve no further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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